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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

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DANIEL MURPHY and ALBERT MENDES,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1966

DANIEL MURPHY and ALBERT MENDES,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Daniel Murphy and Albert Mendes, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered March 10, 1967. The opinion of the Court of Appeals is printed in the Appendix to this petition (A1-8).*

Jurisdiction

The judgment of the Court of Appeals was entered on March 10, 1967 (A9) and a timely petition for rehearing was denied on March 30, 1967 (A10-11). The time to file this petition was extended from April 29, 1967 to May 20, 1967, by order of Mr. Justice Harlan, dated April 25, 1967 (A12).

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* References to the Appendix will be preceded by the letter "A." All references without such designation will be to petitioners' Appendix in the Court of Appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Where the conviction of petitioners rested on the uncorroborated word of participants in the crime, all of whom testified under grants of immunity, and the simple question for the jury's determination was one of credibility as to whether or not petitioners received Christmas gratuities in violation of the Taft-Hartley Act, were petitioners deprived of a fair trial in violation of their constitutional rights, by reason of inflammatory and prejudicial remarks of the prosecutor during his summation, as follows:

(a) Petitioners were accused of committing numerous other offenses not charged in the indictment, and as to which the record is devoid of supporting evidence. The charge in the indictment involved the alleged receipt of approximately $5,000.00 by petitioners from four employers over a five-year period. On the basis of the prosecutor's inflammatory suggestion, the jury was rather led to infer that petitioners had, in fact, received many thousands of dollars from numerous employers as to which they were never brought to justice.

(b) Petitioners were further accused, without any evidentiary support in the record (or on the basis of "tenuous inference", at best, as noted by the Court below [A6]), of having engaged in extorsive conduct resulting in the extraction of the funds in question from various employers. The inexorable result of the combined arguments by the prosecutor as to the commission of other offenses and extorsive conduct was to

unfairly depict petitioners before the jury as wholesale offenders engaged extensively in the shakedown of employers.

(c) The prosecutor further argued to the jury that the grant of immunity to the Government witnesses demonstrated that a crime was committed, consisting of the receipt of the monies by petitioners, thus misleading the jury in their determination of the ultimate issue presented and unfairly pitting the belief and prestige of the Government against petitioners.

2. Whether prejudicial remarks by the prosecutor can properly be deemed cured and the prejudice eradicated from the jury's mind by an instruction of the trial court which (a) fails to affirmatively instruct the jury to disregard and ignore the remarks; (b) further fails to admonish the jury that the prosecutor's inflammatory suggestion is devoid of evidentiary support; and (c) where the prosecutor returns to the prejudicial argument after the alleged curative instruction is given by the court.

3. Whether in the prosecution for a crime, *malum prohibitum* in nature, involving as its principal element the mere receipt of money by the accused, without more, the Government should be allowed to circumstantially show an extorsive motive on the part of the accused by reference to the alleged existence of a motive for payment of the money on the part of the payors, such motive for payment being dependent upon the operation of the mind of the payors and there being no proof that such frame of mind was instigated by, or ever communicated to, the accused.

Statutes Involved

The statutes involved in the indictment are 29 U.S.C. Section 186, and 18 U.S.C. Section 2. The constitutional provision involved is the Fifth amendment to the United States Constitution. All are printed in the Appendix hereto (A13-18).

Statement

Petitioners were convicted in the United States District Court for the Southern District of New York, upon a jury verdict, for accepting payments of money, as Labor Union officials, in violation of 29 U.S.C. §186 and 18 U.S.C. §2 (116a-19a). They were sentenced to maximum prison terms of one year.

During the relevant period in question, petitioners were the financial secretary and business agent, respectively, of Local 580, National Association of Bridge, Structural and Ornamental Ironworkers AFL-CIO (67a, 81a).

The indictment (4a-6a) contained 17 counts, charging petitioner Murphy in counts 1 through 15 and petitioner Mendes in counts 1 through 5, 16 and 17. It was alleged that during a five-year period from 1960 through 1964, inclusive, petitioners received payments of money from four employers in the aggregate sum of approximately $5,000. The alleged payments were confined to the month of December in each year. With the exception of three payments from one employer in the alleged amount of $1,000 each, the other 14 payments charged varied in amounts from $100 to $200, totalling $1,975.

The case of the Government at trial rested entirely upon the uncorroborated word of the four employers involved. Each employer testified under grant of immunity from the Department of Labor, and claimed to have made payment to petitioners of money during the Christmas season in each year, as charged in the indictment.

Briefly to summarize the highlights of their testimony, the first employer, one Wander, claimed that in December, 1960, he gave a "Christmas present" of $200 in cash to petitioner Mendes, for himself, petitioner Murphy and two others (10a-11a). There was further testimony as to the delivery of Christmas gifts during the next three succeeding years, consisting of envelopes containing $25 in cash and totalling $100 in each year, allegedly delivered through an employee of Wander, for petitioners and two others (11a-12a, 25a-28a). The second employer, one Davis, testified as to the delivery of envelopes with $1,000 in cash during the months of December in 1961 through 1963, on which occasions he expressed "A happy holiday for the season" (31a-33a). A third employer, one Hirschberg, testified to having extended "season's greetings" with the delivery of four envelopes, each containing $50 in cash, for petitioners and two other union representatives, during the years 1961 through 1963 (48a-49a). The fourth employer, one Perlman, claimed to have given envelopes, containing a total of $100 in cash, during the month of December in the years 1960 through 1963 (60a-62a).

The Government's attempt to corroborate the testimony of the employers by reference to certain records completely failed (See A3, n. 3). Petitioners took the stand and categorically denied ever receiving any payments from the

said employers (70a-71a, 82a-85a). They also called six character witnesses, mainly representing management, who testified as to their excellent reputation for truthfulness and honesty (88a-92a). Accordingly, the issue presented in this case was a simple one of credibility (as both courts below and the parties recognized [See 94a, 106a-08a; A3]), as to whether or not petitioners received certain specific Christmas gratuities from four employers.

REASONS FOR GRANTING THE WRIT

1. The prosecutor's suggestion as to the commission of numerous other offenses by petitioners and his characterization of the crimes committed as extortion, all without adequate foundation of fact in the record, served to depict petitioners as wholesale offenders engaged in far more serious crimes than those charged, thus depriving petitioners of a fair trial and prejudicing a just determination of their cause by the jury.

The first incident of which petitioners complain arose during summation when the prosecutor sought to fashion—improperly, we submit—a motive on the part of the employers for the payments claimed to have been made by them to petitioners. Thus, the prosecutor submitted the following question for response:

> "Well, why were these union officials treated differently from the other people who got liquor? Or, to state the question another way, why—why were these so-called Christmas payments made?" (98a).

Immediately following was the answer of the prosecutor, which pointedly introduced a lurid element into the case on two scores: First, it was suggested, without foundation of

fact in the record, that the payments allegedly made to petitioners were extorsive in nature, being the fruits of a shakedown—as opposed to mere Christmas gifts. Second, it was insinuated that the shakedown was far broader in scope than the actual charge in the case, which involved only four employers. The prosecutor wrongfully sought to include all employers with whom petitioners dealt, without the benefit of a charge in the indictment as to dealings with such employers or evidence to support it—thus, depicting petitioners as wholesale offenders, reaping enormous sums of money illicitly.

The answer of the prosecutor to his self-posed question was accordingly as follows:

> "A Christmas payment is usually $5, a bottle of liquor, $10. These really weren't Christmas payments, but *they were something else.* Here we are talking about roughly $5,000 for a four-year period from four employers. *And how many other employers did these union officials represent?* (98a; emphasis supplied).

The "something else" to which the prosecutor had reference (as he abundantly made clear later on) was extortion. As to the transactions with the "other employers", not charged in the indictment, the insinuation was that petitioners had received hundreds of thousands of dollars, as opposed to the mere $5,000, or so, as to which there was evidence in the record.

To demonstrate the impact of the prosecutor's suggestion, the testimony showed that approximately 350 employers dealt with the union (87a). The mathematical computation suggested to the jury by the prosecutor was

accordingly an easy one—to wit, $1,250 per employer multiplied by 350 for a grand total of over $400,000, allegedly extorted by petitioners over a four-year period.

When these remarks were made by the prosecutor, counsel for petitioners immediately objected and moved for a mistrial (98a). The trial court, while agreeing that the reference to other transactions was improper as "not within the case", did not think that a mistrial was indicated (98a). An instruction was given, instead, whereby the jury were asked to "confine" their attention (as the Circuit Court characterized the matter [A4]) to the specific offenses charged (99a). They were not affirmatively instructed, however, to disregard the prejudicial matter. Nor were they told that the accusation was utterly without foundation in the record.

Subsequent to the instruction by the trial court, the prosecutor persisted in the matter. Abandoning for the moment the accusation of other crimes not charged, he returned immediately to build upon the theme of extortion and shakedown. The prosecutor accordingly continued as follows:

> "Why did these employers make these payments? That is the important question. Well, you have to understand the industry. And you heard it from all of the witnesses. Murphy admitted to it. Nash talked about it. Other witnesses talked about it. When you need men, you call up the union hall and the union hall sends these men to these various construction jobs. Now, it is quite obvious. *You have some good workers in that union hall and there are some very bad ones.* And if you look at the contracts, you will see that the wage rate for the iron workers belonging to Local 580 are roughly $4 or $5 an hour.

Now, no employer, businessman, who is trying to make money can afford to pay $4 or $5 an hour to an incompetent. He needs a good man. *He doesn't want to antagonize these two people because these people can give him a very rough time in their business.* These witnesses for the government are businessmen. They want to make money, like you want to make money. You are businessmen also. And that brings up another point.

These two men are still union officials. These employers have no stake whatsoever in antagonizing these two people. *These two people have the power to send these employers poor workers day after day.*" (99a; emphasis supplied.)

Thereafter, and towards the end of summation, the dual theme of extorsive power and offenses not charged was brought up again. Thus, it was argued by the Prosecutor, as follows:

"Now, the other point to remember about the defendants' testimony is that both of them said never, *never within these years* did they take so much as one cent *from any employer,* never, which is the biggest word I think in the language. *Can you really believe that these two people who sit with the power that they have never took anything at any time?* That is what they are asking you to do. If you believe that they never took *anything at any time* within these four years, then you should believe them and acquit them. *But if you use your common sense and understand the nature of their position and understand who they are, I am sure you can't believe that they never took so much as one penny.* And I think that is the real hint in the case. It is an impossible thing to put forth on the stand, such a position, and it shows that they

are incredible and unbelievable witnesses." (102a; emphasis supplied.)

After the court's charge to the jury, counsel for petitioners, referring to the prosecutor's suggestion of illicit use of power by petitioners, asked for a limiting instruction (111a-12a), which the trial court refused (112a).

The general rules applicable to argument by the prosecutor during summation are well established. "It is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence, and not part of the evidence to be presented; or to make unwarranted inferences or insinuations calculated to prejudice the defendant" (*Dunn* v. *U.S.*, 307 F. 2d 883, 885-86 [5th Cir., 1962]). Although "counsel may suggest such legitimate inferences as could be drawn from the evidence produced at the trial, he may not refer to prejudicial facts having no basis in the record, or draw upon conjecture" (*U.S.* v. *Schwartz*, 325 F. 2d 355, 358 [3rd Cir., 1963]).

The remarks of the prosecutor in the case at bar, we submit, violated these well-established principles for trial conduct, and effectively served to deprive petitioners of a fair trial.

There was not a shred of evidence in the record to support the insinuation of the prosecutor that petitioners were guilty of the commission of other crimes; and the repeated characterization by the prosecutor of the crimes allegedly committed as extortion was equally lacking in evidentiary support.

In contrast to the prosecutor's claim of alleged extortion, the witnesses for the Government uniformly testified that

the alleged payments to petitioners were Christmas gratuities and nothing more. It appears, moreover, from the testimony of the four employers involved that the entire matter unilaterally sprung from them. There was no evidence of any solicitation, demand or threat by petitioners respecting these gratuities; nor was there any proof that the employers were impelled to act by any force, violence or fear engendered by petitioners, or any instigation whatsoever on petitioners' parts. Such are the elements of a prosecution for extortion (see, e.g., 18 U.S.C. § 1951 [b] [2]; *Bianchi* v. *U.S.*, 219 F. 2d 182, 190-3 [8th Cir., 1955]), which the prosecutor improperly sought to inject into the case, with all of its inflammatory ramifications.

Focusing on the specific accusations made by the prosecutor, there is no evidence in the record that petitioners possessed the unbridled "power", as the prosecutor inferred, to send the employer-witnesses "poor workers day after day"; or to give the employer's "a very rough time" (99a; emphasis supplied). Nor is there evidence that petitioners ever, in fact, sent these employers poor workers, that they gave them, in fact, a rough time, or that they ever threatened or attempted to do so. Similarly, there was no testimony as to an intention, desire, or lack thereof, on the part of the employers to "antagonize" petitioners, as mentioned by the prosecutor (99a). Moreover, the evidence as to the workers connected with the union was not even sufficient to permit their characterization by the prosecutor as "good", "very bad", "poor", or otherwise (99a).

We submit that this entire matter, combined with the insinuations as to other crimes, was but an improper attack by the prosecution upon petitioners' character and an at-

tempt to depict them as evil men—indeed, thugs. The overall portrait presented to the jury was one of wholesale trafficking by petitioners in the illicit use of union power. Such a portrayal was entirely unjustified and had no rightful place in the prosecution of the case at bar. This was a simple case with a very limited issue for determination. The issue on the evidence was simply whether or not petitioners received certain specific Christmas gratuities from four employers—a crime, *malum prohibitum* in nature, under the Taft-Hartley Act (*U.S.* v. *Ryan*, 350 U.S. 299, 305, 100 L. ed. 335, 76 S. Ct. 400 [1956]). The prosecutor in his summation, however, went far beyond this simple issue; and in light of the rulings below, was permitted to have a conviction returned for a lesser crime by improper argumentation, without evidentiary support, as to the commission of other and far more serious crimes of a venal nature.

In our view, either the insinuations as to the commission of other crimes or the allegations of extortion and shakedown, standing alone, were sufficient to violate petitioners' rights to a fair trial and prejudice a just determination by the jury of the simple issue as to the receipt, or not, of mere Christmas gratuities. Certainly, in combination, such a result was inevitable.

The Circuit Courts of Appeal for the Fifth and Third Circuits have held in situations not unlike those presented in the case at bar, that the rights of an accused to a fair trial have been violated, ordering a reversal of their convictions. (See e.g., *Wagner* v. *U.S.*, 263 F. 2d 877, 883 [5th Cir., 1959]; *Dunn* v. *U.S.*, *supra*, 307 F. 2d 883, 886 [5th Cir., 1962]; *U.S.* v. *Lynch*, 366 F. 2d 829, 831-2 [3rd Cir., 1966]; Cf. *Blumberg* v. *U.S.*, 222 F. 2d 496, 500-01 [5th Cir.,

1955]; *Ginsberg* v. *U.S.*, 257 F. 2d 950, 954 [5th Cir., 1958]; *U.S.* v. *Schwartz, supra*, 325 F. 2d 355 [3rd Cir., 1963]).

In the *Wagner* case, *supra*, the charges involved conspiracy to defraud and bribery in connection with the sale of certain fuel oil by defendants to the Government. The prosecutor in summation—allegedly responding to the claim that one of the defendants, Peek, did not make any money on the transactions in question—argued, in part, that he "can't get too concerned about that"; that he has "an idea that Peek did make some money"; in fact, he "think[s]" that "Peek was in the business and he made a lot of money." The Third Circuit, after noting that relatively small amounts of money were involved in any profits made from the sale of fuel oil to the Government during the period covered by the indictment, held that

> "This argument was a plain effort to have the jury believe that Peek and Wagner were guilty of other and more profitable frauds. It was a wholly impermissible development of a theme on which Government counsel had reached the outer limits of proper argument in his opening * * *." (263 F. 2d at p. 883).

It was ruled that injection of the matter into the case, combined with other improper remarks by the prosecutor during the summation, constituted plain error requiring reversal—notwithstanding the absence of objection by counsel (*Id.* at p. 884).

In the *Dunn* case, *supra*, defendant was charged with income tax evasion. The Government claimed that while serving as Mayor of a city, defendant received payments from the city and contractors and suppliers dealing with the city and county, which were never reported. During sum-

mation, the prosecutor made a statement to the effect that "all politicians took kickbacks on contracts such as these." The court commented on this, as follows:

> "At the time Dunn was the elected Mayor of the City of Baxley. The case against Dunn on this point rested on the veracity of DeLaigle. To insinuate that Dunn must have gotten the money from DeLaigle because Dunn was a politician and that their relationship was a nefarious political deal, was improper and prejudicial" (307 F. 2d at p. 886).

The court held this to be reversible error, notwithstanding an attempt by the trial court to give a corrective charge.

We submit, indeed, that the insinuations of the prosecutor in the *Dunn* case, which the Circuit Court found to be so egregious, are akin to those of the prosecutor in the case at bar. Not unlike the claim in *Dunn* that "all politicians took kickbacks," the prosecutor in our case emphasized petitioners' position as union leaders, hitting with "power", and inferred that in view of the "nature of their position," they were regularly on the take, involved in nefarious dealings of an extorsive nature (102a, 99a).

The decisions above-cited, typified by the *Wagner* and *Dunn* cases, *supra*, we submit, are indicative of a trend in the Fifth and Third Circuits, which stands in contra-distinction to the view obtaining in the Second Circuit, where a reluctance to reverse is evident—even though impropriety on the part of the prosecutor is conceded. Thus, the Court below, while declining to reverse, generally noted that the remarks of the prosecutor in the case at bar evidenced "a lack of restraint" (A2), and that "greater care and restraint" should have been shown "in arguing the matters of which the appellants complain" (A8). As to the specific matters

involved, the Court of Appeals held "that it would have been better" if the insinuation as to other offenses had not been made (A4), and that the argument on extorsive motive was dependent upon a request by the prosecutor that the jury "draw a somewhat tenuous inference" (A6).

The further views expressed by the Court of Appeals as to these matters in its opinion—specifically, the effect to be accorded the curative instruction given as to the commission of other offenses and the relevance of argument on extorsive motive, give rise to separate issues for review by this Court in the interest of the proper administration of criminal justice in the Federal Courts, and are hereinbelow discussed.

2. The instruction given by the trial court was entirely inadequate to eliminate the prejudice engendered, failing to satisfy the minimum standards for curative instructions in accordance with prevailing decisional law in the Federal courts.

After counsel had objected to the insinuation of the prosecutor as to the commission of other offenses by petitioners, and moved for a mistrial, the trial court charged the jury, as follows:

> "Gentlemen, the issue in this case is contained within the indictment that is charged. These men are accused of these 17-odd crimes here and that is our only problem: Are they guilty or not guilty of those charges, and nothing else" (99a).

The Court of Appeals regarded this instruction as "sufficient to overcome any prejudice" (A4). We submit, however, that the nature of the accusation was such that it

could not be eradicated from the minds of the jury; and holding otherwise is to indulge a fiction. As the Court of Appeals for the Fifth Circuit stated in the *Dunn* case, *supra*, " 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.' " (307 F. 2d at p. 886; see also *U.S.* v. *Schwartz, supra*, 325 F. 2d at p. 358; *Ginsberg* v. *U.S., supra*, 257 F. 2d at p. 953; Cf. *Wagner* v. *U.S., supra*, 263 F. 2d at p. 884).

In any event, even if it be assumed that the prejudice could have been corrected by admonition from the bench, it is submitted that the trial judge in this case did not go far enough. Thus, the jury was not positively instructed to ignore the comment, or affirmatively urged to disregard its implications. Rather, as the Court of Appeals noted in its opinion, the jury, at best, was urged to "confine" its attention to the specific offense charged (A4). An instruction to "confine" one's mind to a matter can hardly compare with a direction to ignore and disregard—which we submit (without conceding that it would have cured the prejudice) was indicated here, at the very least. Furthermore, if the matter be deemed curable by a proper instruction, the jury also should have been told that the insinuation of the prosecutor was baseless, without any evidentiary support in the record.

In *U.S.* v. *Schwartz, supra*, the Third Circuit ruled, as we urge, that a curative instruction must embody, as a bare minimum, an affirmative direction to "*disregard*" the prejudicial matter (325 F. 2d at p. 358; emphasis supplied). Indeed, the very cases cited by the Court of Appeals in its opinion below (A4), support this view, and stand at variance with the determination rendered by that Court herein.

Thus, in *U.S.* v. *Caruso*, 358 F. 2d 184 (2nd Cir. 1966), the trial Court "promptly and properly instructed the jury to *disregard*" the remark (*Id.* at p. 186; emphasis supplied). Similarly, in *U.S.* v. *Courtney*, 257 F. 2d 944 (2nd Cir. 1958), where the prosecutor made reference in his opening to defendant's failure to answer before the grand jury, the trial court instructed the jury in a positive manner that defendant had "a perfect right to refuse to answer questions before the Grand Jury;" and further offered to charge the jury that they must "*disregard*" the prosecutor's remark (*Id.* at p. 947; emphasis supplied). So too, in *U.S.* v. *Stromberg*, 268 F. 2d 256 (2nd Cir. 1959), also cited by the court below, the possible prejudicial effect of one remark by the prosecutor was deemed cured by immediate court reproval of the prosecutor and admonition to the jury that "the remark was to be *disregarded*" (*Id.* at p. 271; emphasis supplied).*

In holding that the instruction was sufficient, the Court of Appeals in the case at bar also overlooked the fact that after the instruction was given by the trial judge, the prosecutor returned to the prejudicial theme once again. Accordingly, even if the instruction be deemed to have had some salutary effect, the repetition of the matter by the prosecutor, in substance, totally negated the effect of the instruction and revived the prejudice.

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* The other remarks challenged by appellants in the *Stromberg* case were deemed harmless for reasons which render it further distinguishable from the case at bar. Thus, a "fiercely contested" (268 F. 2d at p. 269) and "long trial" was involved (*Id.* at p. 271). Moreover, the remarks were viewed generally as "no more than fair and vigorous advocacy," also being "in response to arguments made in the summations for the appellants." (*Id.* at p. 272).

Thus, as we have seen, after the instruction was given, the prosecutor stressed that in his estimation the jury could not believe that petitioners failed to take money from "*any* employer", or that they failed to take "anything at *any* time;" and further that if the jury used its "common sense" and understood "the nature of their position" and "who they are", they could not "believe that they *never* took so much as *one* penny" (102a; emphasis supplied).

This argument was not confined to the crimes charged in this case. Its scope was rather far-reaching, encompassing the prior impermissible suggestion of the prosecutor. In its light, the jury was essentially being told that in view of petitioners' dealings with so many other employers—in addition to the four actually involved in the case—one could not believe that they never took a single Christmas gratuity. The jury was accordingly urged to convict for crimes charged in the indictment on the basis of speculative inference, unsupported by proof, as to the probable commission by petitioners of other crimes, not charged. By the same token, the jury was improperly imbued with the sentiment that petitioners were lucky to be let off by a charge involving only four employers; and hence, could not complain if a conviction were returned—even if the proof as to those four employers were doubtful in the jury's minds.

We believe it is sound doctrine that the "government cannot go on * * * making such remarks and having the court strike them out, and then claim they had no effect" (*Kitchell* v. *U.S.*, 354 F. 2d 715, 719 [1st Cir., 1965]). Such was the situation at bar.

3. The reasoning of the court below as to the propriety of showing motive, constitutes a misapplication of doctrine and establishes a dangerous precedent, prejudicial to a defendant's rights, in the administration of Federal criminal justice.

In discussing the prosecutor's attempt to characterize the crimes involved herein as extortion, the Court of Appeals reasoned that "the Government may prove motive as circumstantial evidence that an offense was in fact committed even where such proof might incidentally show the commission of another offense" (A 5-6). We do not quarrel with this statement of general rule. It is submitted, however, that it has no application to this case; and that the holding below to the contrary is unique and establishes a dangerous precedent in the administration of Federal criminal justice.

The prosecutor's remarks in the case at bar involved at best a motive on the part of the employers, perhaps indicating the commission of an act by them. Thus, upon examination of the pertinent remarks of the prosecutor (99a, 102a), we find their thrust essentially to have been that the *employers* allegedly did not want to antagonize petitioners, that *they* were afraid of the possible misuse by petitioners of union power, which could result in grave economic harm to *them*. These were all matters relating to the employers' frame of mind and general circumstance.

Such factors, however, would only go to explain a possible motive on the part of the employers to *give* money. But the fact that the employers may have had a motive to give, can hardly serve to prove a motive on the part of petitioners to *receive* the money, which was the controlling issue in the case.

The effect of the holding below as to the relevancy of the argument on motive, therefore, is that the existence of a reason in one person's mind to do an act can serve as circumstantial proof of another person's frame of mind or the performance of an act by such other person—even though there is a complete absence of proof that the other person was aware of the operation of the first person's mind. This is dangerous doctrine, in conflict with prevailing law, and indeed, the authorities cited by the Court below (A 6).

Thus, in *U.S.* v. *Houlihan*, 332 F. 2d 8 (2nd Cir.) *cert. denied*, 379 U.S. 828 (1964), involving charges of mail and wire fraud and the interstate transportation of stolen securities, certain proof as to motive was admitted, consisting of financial difficulties of defendant which might induce him to participate in the fraud. It was also shown that he benefited from a related fraudulent transaction (332 F. 2d at pp. 14-15). These circumstances bore directly upon a motive by defendant—not a third party—to perform the criminal acts in question; and were accordingly provable under traditional doctrine.

In *U.S.* v. *Johnson*, 254 F. 2d 175 (2nd Cir.) *appeal dismissed*, 357 U.S. 933 (1958), it was shown in a conspiracy, mail theft and forgery prosecution that narcotics were purchased with the proceeds of a check and used by defendant. This proof was deemed permissible because it showed that defendant shared in the fruits of the conspiracy and accordingly had a motive to join. There too, then, the acts directly involved defendant and evidenced a motive on his part.

So too, it is reasoned by Professor Wigmore that in connection with motive our focus is upon the mind of the

defendant and we are concerned with a state of mind or emotion on his part, which explains or proves the doing of an act by him (1 Wigmore, Evidence §§117-118); and that the

> "circumstances said to have excited the emotion *must be shown* to have probably *become known* to the person; because otherwise it could not have affected his emotions."

(2 Wigmore, Evidence §389, p. 329).

As we have indicated, the contentions as to motive in this case do not meet the foregoing requirements—being confined to a frame of mind on the part of the employers, not proven to have been known by petitioners and further not involving the performance of an act by them.

We also maintain that the reasoning of the Court below that the "tenuous inference" which the prosecutor was permitted to draw did not constitute reversible error since it went "only to motive and not directly to the ultimate issue of guilt or innocence" (A6) is unsound. As a practical matter, the prosecutor's argument bore heavily on the ultimate issue of guilt or innocence. The result of the prosecutor's argument on extortion—coupled with the prior allusion to other offenses—was to inject a sordid atmosphere into the case, whereby petitioners were unfairly portrayed as evil men, ruthlessly using union power to intimidate. Where a defendant is thus unfairly stigmatized, it can hardly be gainsaid that the jury is influenced in its determination of the ultimate issue of fact upon which guilt or innocence depends.

4. Petitioners' rights to a fair trial were further violated by reason of the additional argument of the prosecutor during summation as to the weight and effect to be accorded the grant of immunity to Government witnesses, which argument served to mislead the jury and unfairly pitted the belief and prestige of the Government against petitioners.

In addition to the inflammatory argument of the prosecutor as to the commission of other offenses and extortion by petitioners, a third incident occurred during summation which also served effectively to deprive petitioners of a fair trial. Misleading argument was utilized and personal belief on the part of the prosecutor and Government, as well as their prestige, was invoked. The matter arose when reference was made to the immunity from prosecution granted to the Government's witnesses. The prosecutor stated, in relevant part, as follows:

> "The immunity which was granted to these witnesses was granted by the Department of Labor. *Now, the Department of Labor isn't going to grant immunity if no crimes have been committed.* And the immunity relates to the testimony that the witnesses give." (100a; emphasis supplied)

He then continued to discuss the matter of immunity and concluded with the following, which we submit transcended all bounds of propriety:

> "So *I think* the fact that each of these people received immunity *shows that they did this crime, that these defendants received the moneys which the government witnesses admitted to.*" (100a; emphasis supplied)

The fact that the Government chose to grant immunity to the witnesses is hardly competent proof that "crimes have been committed"—or that petitioners "received the moneys which the Government witnesses admitted to," as the prosecutor contended. Such argument was improper and misleading. It was worse, we submit, than telling the jury that indictment by the Government constituted proof of guilt.

The prosecutor was also telling the jury by means of the foregoing that it was his personal belief, and more particularly, the United States Department of Labor, that petitioners, as a certainty, committed the crime charged, otherwise immunity would not have been conferred upon the employers.* The ultimate effect of this argument was also to unfairly place the power and prestige of the prosecutor, his office, and the Department of Labor on the line against petitioners. From the jury's point of view, the mere denials of petitioners that they took money, could not measure up to the beliefs and opinions to the contrary, expressed as a matter of certainty, of such august bodies as the U.S. Attorney's office and Department of Labor of the United States Government.

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* Our position that the instant argument by the prosecutor involved the expression of personal belief, does not exclusively turn upon use of the phrase "I think", as the Court of Appeals indicated in its opinion (A7). It is our contention rather that the *entire* argument on the matter involved the expression of belief by the prosecutor and invocation of the prestige of Government office. As above indicated, the argument, of necessity, was dependent upon personal belief. Thus, the Government was essentially saying that if it did not believe the witnesses, immunity would not have been granted to them; or put another way, since the Government chose to believe the employers, as evidenced by the grant of immunity, this should be accepted as conclusive on the issue of receipt of money by petitioners.

The introduction into the case of such matters as the personal beliefs of the prosecutor and the prestige of his office and the Federal Government, violated well-established rules for the conduct of trials in the Federal courts. (See, e.g., *Greenberg* v. *U.S.*, 280 F. 2d 472, 474-5 [1st Cir., 1960]; *U.S.* v. *Spangelet*, 258 F. 2d 338, 342-43 [2nd Cir., 1958]; *U.S.* v. *Pepe*, 247 F. 2d 838, 844 [2nd Cir., 1957]; *Cf. Reichert* v. *U.S.*, 359 F. 2d 278, 281-2 [D.C. Cir., 1966]).

The Court of Appeals recognized in its opinion that at least one aspect of the prosecutor's argument as to the effect of the grant of immunity "was, of course, improper" —namely, to the extent that "the granting of immunity to the four contractors should be taken as evidence that the crimes had been committed" (A7). The Court proceeded to reason, however, that the prosecutor was talking at that point "about the crimes committed by the contractors in paying the moneys; not about the guilt of the defendants" (*Ibid.*).

We respectfully submit that the jury was incapable of making such a subtle distinction. The seed having been planted in their minds that immunity was conclusive on the issue of "crimes hav[ing] been committed", and that the employers "did this crime" (100a), it must presumed that they took the next step and concluded impermissibly that this also conclusively proved the commission of a crime by petitioners—or, as the prosecutor squarely put it, "that these defendants received the moneys * * *." (100a).

The Court of Appeals further sought to ascribe benign implications, in context, to the prosecutor's argument, by reasoning that this was but an argument "to persuade the jury that it ought to believe the Government witnesses"

(A8). This is to ignore, however, the sheer force and weight of the prosecutor's contention on the matter of immunity. The argument involved more than mere credibility. The Government essentially lifted itself by its own bootstraps, plainly stating that immunity would not have been granted "if no crimes had been committed", and that the grant of immunity demonstrated that petitioners "received the moneys which the Government witnesses admitted to." We submit that no amount of rationalization can serve to mitigate the misleading and prejudicial effect of such an argument.

The argument of the prosecutor on immunity, in our view, was sufficiently misleading and prejudicial to constitute plain error, qualifying as an error which "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings"—as stated by this Court in *U.S.* v. *Socony Vacuum Oil Co.* (310 U.S. 150, 239 [1940]). The absence of objection thereto by counsel, therefore, should not be deemed determinative.

The entire issue of the weight which can be accorded to a grant of immunity by a prosecutor in support of the Government's case and as corroboration of Government witnesses, if at all, appears to be a question of first impression in this Court. In light of the extensive use of immunity grants in Federal prosecutions, it is submitted that the promulgation of guidelines by this Court is indicated, which will obviate the recurrence of misleading and prejudicial argument such as occurred in the case at bar.

CONCLUSION

This was a close case. The trial below was neither "fiercely contested" (*U.S.* v. *Stromberg, supra,* 268 F. 2d at p. 269; *see also U.S.* v. *Schwartz, supra,* 325 F. 2d at p. 358) nor "prolonged" (*U.S.* v. *Socony Vacuum Oil Co., supra,* 310 U.S. at p. 240), and evidence of guilt was hardly overwhelming (*See U.S.* v. *Gorman,* 355 F. 2d 151, 153-4 [2nd Cir., 1965]). To the contrary, a sharp conflict of fact was presented in the case at bar and the version of the facts urged by the Government rested entirely upon the uncorroborated word of participants in the crime. Under such circumstances, even the slightest error is regarded as prejudicial—being deemed sufficient to tip the scales and render the trial unfair (*Krulewitch* v. *U.S.,* 336 U.S. 440, 445 [1949]; *Bihn* v. *U.S.,* 328 U.S. 633, 638 [1946]; *Glasser* v. *U.S.,* 315 U.S. 60, 67 [1942]; *U.S.* v. *Persico,* 305 F. 2d 534, 536-7 [2nd Cir., 1962]).

The errors committed in the case at bar and the prejudice engendered, in our view, were far from slight. In a simple matter, involving an issue as to the receipt of Christmas gratuities, *malum prohibitum,* petitioners, as we have seen, were unfairly depicted—without supporting evidence in the record—as wholesale shakedown artists, reaping enormous sums of money from their allegedly illicit activities; and the weight and prestige of the Federal Government was put on the line in resolution of the factual issue presented. Under such circumstances, the jury could not but help to convict petitioners, taking an attitude that these were evil men—lucky to be let off with the minimum offense here charged.

The Court of Appeals acknowledged in its opinion, as we have seen, that error had been committed in respect of the matters as to which petitioners complain, noting that "it would have been better" if the insinuation as to the other offenses had not been made (A3); that as to the alleged matter of extortion, the jury was asked to "draw a somewhat tenuous inference" (A6), and that at least one aspect of the prosecutor's argument on immunity "was, of course, improper" (A7). The Court further generally noted that the remarks of the prosecutor evidenced a "lack of restraint" (A2) and that "greater care and restraint" should have been shown "in arguing the matters of which the appellants complain" (A8). The Court declined, however, to order a new trial.

We maintain that each of the errors assigned in this case, standing alone, was sufficient to prejudicially tip the scales against petitioners, depriving them of their constitutional rights to a fair trial. Certainly, their cumulative effect accomplished such a result.

Under all the circumstances hereinabove set forth, therefore, it is respectfully prayed that the writ of certiorari should be granted.

Respectfully submitted,

Moses L. Kove
Attorney for Petitioners

Jacob W. Heller
Of Counsel

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 331—September Term, 1966.

(Argued February 21, 1967 Decided March 10, 1967.)

Docket No. 30907

UNITED STATES OF AMERICA,

Appellee,

—v.—

DANIEL MURPHY and ALBERT MENDES,

Appellants.

Before:

FRIENDLY, ANDERSON and FEINBERG,

Circuit Judges.

Appeals from judgments of conviction against defendants, labor union officials, for accepting payments of money from employers in violation of 29 U. S. C. §186 and 18 U. S. C. §2, in the United States District Court for the Southern District of New York, before Thomas F. Murphy, *Judge,* and a jury. Affirmed.

JOHN S. ALLEE, Assistant U. S. Attorney, Southern District of New York (Robert M. Morgenthau, U. S. Attorney, and Michael W. Mitchell, Assistant U. S. Attorney, Southern District of New York, on the brief), *for Appellee.*

JACOB W. HELLER, Esq., New York, N. Y. (Heller & Dretzin and Moses L. Kove, Esq., New York, N. Y., on the brief), *for Appellants.*

ANDERSON, *Circuit Judge*:

The appellants, Daniel Murphy and Albert Mendes, were respectively the financial secretary and business agent of a local union of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO. They were found guilty by a jury of having willfully violated §302 of the Taft-Hartley Act[1] (29 U. S. C. §186) by receiving payments[2] of money from four employers who were engaged in the business of fabricating and erecting iron and steel structures and whose employees were members of the local union. Both appeal from the judgments of conviction entered on the verdicts.

The points raised on appeal concern statements made by the prosecutor in his summation to the jury, which the appellants assert were inflammatory and prejudicial. We conclude that, although the remarks complained of were examples of a lack of restraint which more competent

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[1] 29 U. S. C. §186 in pertinent part provides:

"(a) It shall be unlawful for any employer . . . to pay . . . any money or other thing of value—

* * * * *

(2) to any labor organization, or any officer or employees thereof, which represents . . . any of the employees of such employer . . .

* * * * *

(b)(1) It shall be unlawful for any person to . . . receive . . . any payment . . . prohibited by subsection (a) . . .

* * * * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor . . ."

[2] Certain excepted payments have no application to the present case.

prosecutors are careful to display, they were not so prejudicial as to call for a new trial, and we affirm.

The Government's case rested almost entirely upon the testimony of the four employers who told of making payments, totalling approximately $5000, to the appellants, as charged. On direct examination it was disclosed that they themselves, though ordinarily liable to prosecution under the statute, had been granted testimonial immunity by the Department of Labor. The accused took the stand and categorically denied ever receiving any payment from any of these four employers or any other employers. Neither side offered any substantial corroborating evidence.[3] The issue presented to the jury was largely one of the credibility of the four employers, on the one hand, and the two union officials on the other.

The appellants argue that in this posture of the case inflammatory statements by the prosecutor were likely to have very damaging consequences. They point to three instances in the course of the prosecutor's argument in which, they assert, he overstepped permissible bounds.

The first of these was when he said,

> "Well, why were these union officials treated differently from the other people who got liquor? Or, to state the question another way, 'Why—why were these so-called Christmas payments made?'

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[3] The Government presented one witness who had delivered envelopes to the union's office, but he did not know the contents of the envelopes. The Government also produced some "records" of payments; however, these documents did not name the payees, and were fragmentary at best.

Appellants presented six character witnesses to testify as to appellants' reputation for truthfulness and honesty.

> A Christmas payment is usually $5, a bottle of liquor, $10. These really weren't Christmas payments. They took the form of Christmas payments, but they were something else. Here we are talking about roughly $5,000 for a four-year period from four employers. And how many other employers did these union officials represent?"

It is the appellants' claim that the prosecutor was, in so saying, suggesting that the accused were engaged in a shakedown which involved many employers in addition to the four concerned in the case. Although it would have been better if the assistant district attorney had not rhetorically asked, "And how many other employers did these union officials represent?", when defense counsel objected, Judge Murphy, to confine the jury's attention and consideration to the specific offenses charged, promptly instructed the jury as follows:

> "Gentlemen, the issue in this case is contained within the indictment that is charged. These men are accused of these 17-odd crimes here and that is our only problem: Are they guilty or not guilty of those charges, and nothing else."

This was sufficient to overcome any prejudice which may have stemmed from the prosecutor's questions. Compare *United States* v. *Caruso*, 358 F. 2d 184, 186 (2 Cir. 1966); *United States* v. *Stromberg*, 268 F. 2d 256, 271 (2 Cir. 1959); *United States* v. *Courtney*, 257 F. 2d 944, 947 (2 Cir. 1958).

The second instance of which the appellants complain is another portion of the summation for the Government where, they say, the prosecutor charged the accused with the motive of extortion. What he said was,

> "Why did these employers make these payments? That is the important question. Well, you have to understand the industry. And you heard it from all of the witnesses. Murphy admitted to it. Nash talked about it. Other witnesses talked about it. When you need men, you call up the union hall and the union hall sends these men to these various construction jobs. Now, it is quite obvious. You have some good workers in that union hall and there are some very bad ones. And if you look at the contracts, you will see that the wage rate for the iron workers belonging to Local 580 are roughly $4 or $5 an hour.
>
> Now, no employer, businessman, who is trying to make money can afford to pay $4 or $5 an hour to an incompetent. He needs a good man. He doesn't want to antagonize these two people because these people can give him a very rough time in their business. These witnesses for the government are businessmen. They want to make money, like you want to make money. You are businessmen also. And that brings up another point.
>
> These two men are still union officials. These employers have no stake whatsoever in antagonizing these two people. These two people have the power to send these employers poor workers day after day."

Appellants contend that these remarks were improper because (a) the Government is not allowed to show motive where it is not an element of the offense, and (2) the prosecutor's argument about motive was not based on any evidence in the record.

The first objection is incorrect as a matter of law; the Government may prove motive as circumstantial evidence that an offense was in fact committed even where such

proof might incidentally show the commission of another offense. *United States* v. *Houlihan*, 332 F. 2d 8, 14-15 (2 Cir.), *cert. denied*, 379 U. S. 828 (1964); *United States* v. *Johnson*, 254 F. 2d 175 (2 Cir.), *appeal dismissed*, 357 U. S. 533 (1958); *cf.*, 1 *Wigmore*, Evidence (3d ed. 1940) §118. The objection that the prosecutor's remarks about motive were unsupported by anything in the record is not fully sustainable. There was testimony about the mechanics of obtaining workers through the union hiring hall controlled by appellants; and common sense, which the jury is supposed to exercise, would say that it was more than likely that there were both good and poor workers. From these acts the prosecutor urged the jury to draw a somewhat tenuous inference; but it was not reversible error—particularly where it went only to motive and not directly to the ultimate issue of guilt or innocence.

The remaining instance concerns another portion of the argument for the Government in which the prosecutor said,

> "The immunity which was granted to these witnesses was granted by the Department of Labor. Now, *the Department of Labor isn't going to grant immunity if no crimes have been committed.* And the immunity relates to the testimony that the witnesses give. . . .
>
> * * * * *
>
> Say you haven't committed a crime. What would be the sense of taking immunity if you hadn't committed a crime. If you hadn't committed a crime, you have nothing to worry about. But if you have committed a crime, you need immunity. But once having immunity—well, if you haven't committed a crime, you have nothing to worry about and you are cer-

> tainly not going to get immunity so that you can walk into court commit perjury, which is a serious crime.
>
> So *I think* the fact that each of these people received immunity shows that they did this crime, that these defendants received the moneys which the government witnesses admitted to." (Emphasis added.)

The appellants contend that the prosecutor thus improperly (a) expressed his own personal belief in the credibility of the Government witnesses, and (b) claimed that the granting of immunity to the four contractors by the Department of Labor was evidence of guilt on the part of the accused.

As a general rule a prosecutor may not express his personal belief in the testimony of witnesses. *United States* v. *White*, 324 F. 2d 814, 816 (2 Cir. 1963); *Greenberg* v. *United States*, 280 F. 2d 472 (1 Cir. 1960). However, the stray inclusion of the phrase "I think" in this portion of his argument hardly, if at all, constitutes an expression of his belief in the witnesses. It could not have been prejudicial, and it was not objected to below. See *United States* v. *Johnson*, 331 F. 2d 281 (2d Cir.), *cert. denied*, 379 U. S. 905 (1964).

The argument that the granting of immunity to the four contractors should be taken as evidence that the crimes had been committed was, of course, improper, but the prosecutor at that point was talking about the crimes committed by the contractors in paying the money; not about the guilt of the defendants. He argued that it was very unlikely that the contractors would have sought immunity if they hadn't committed the crimes and it was also unlikely that they would risk a charge of perjury by testifying to the commission of crimes that never occurred. These arguments

were presented to persuade the jury that it ought to believe the Government witnesses. He then went on to argue that the jury should believe that, as the contractors testified, the "defendants received the moneys."

In the course of presenting the evidence for the Government the prosecutor brought out that each employer was aware that his grant of immunity did not shield him from prosecution for perjury. It seems clear that the court and counsel in the case, at the time the summation for the Government was being made, took the prosecutor's remarks as directed toward the credibility of the four contractors. The trial judge did not intervene and there was no objection by defense counsel.

> "[C]ounsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial."

United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238-239 (1940). Compare *United States* v. *Johnson, supra.*

We conclude that there is insufficient ground to warrant the ordering of a new trial even though we are of the opinion that the assistant district attorney should have shown greater care and restraint in arguing the matters of which the appellants complain.[4]

The judgments below are affirmed.

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[4] Neither of the Assistant United States Attorneys who represented the Government in this appeal, was the prosecutor at the trial.

APPENDIX B

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of March one thousand nine hundred and sixty-seven.

Present:

HON. HENRY J. FRIENDLY,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL MURPHY and ALBERT MENDES,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

/s/ A. DANIEL FUSARO
Clerk

APPENDIX C

Order of United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirtieth day of March, one thousand nine hundred and sixty-seven.

Present:

HON. HENRY J. FRIENDLY,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Daniel Murphy and Albert Mendes,

Defendants-Appellants.

A petition for rehearing together with a motion in the alternative to stay the issuance of the mandate and continue appellants' release on their own recognizance having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Appendix C—Order of United States Court of Appeals Denying Petition for Rehearing

Ordered that said petition for rehearing be and it hereby is denied.

Further ordered that the motion for a stay of the issuance of the mandate be and it hereby is granted and that the issuance of the mandate be and it hereby is stayed pursuant to and subject to the provisions of Rule 28(c) of the rules of this Court.

A. DANIEL FUSARO
Clerk

APPENDIX D

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. .....

DANIEL MURPHY AND ALBERT MENDES,

Petitioners,

vs.

UNITED STATES

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 20th, 1967.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States

Dated this 25th
day of April, 1967

APPENDIX E

Statutory and Constitutional Provisions Involved

Title 29, Section 186, United States Code

§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions,

decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with

respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are

to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-115 of this title.

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits. June 23, 1947, c. 120, Title III, § 302, 61 Stat. 157; Sept. 14, 1959, Pub.L. 86-257, Title V, § 505, 73 Stat. 537.

Appendix E—Statutory and Constitutional Provisions Involved

Title 18, Section 2, United States Code

§ 2. Principals

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

United States Constitution, Fifth Amendment

AMENDMENT V—CAPITAL CRIMES: DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 171

DANIEL MURPHY AND ALBERT MENDES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 374 F. 2d 651.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1967. A petition for rehearing was denied on March 30, 1967 (Pet. App. C). On April 25, 1967, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including May 20, 1967. The petition was filed on May 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

388-437—67

QUESTION PRESENTED

Whether petitioners' convictions should have been reversed because of improper summation by government counsel.

STATUTE INVOLVED

Section 302 of the Labor Management Relations Act of 1947 (29 U.S.C. 186) provides in part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
>
> (4) To any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in re-

spect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * * * * *

(d) any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

STATEMENT

Petitioners were charged in the United States District Court for the Southern District of New York with having received payments of money from steel and iron construction businesses employing union members whom petitioners represented, in violation of 29 U.S.C. 186. Petitioners were convicted after a jury trial and each was sentenced to imprisonment for one year. The court of appeals affirmed.

The indictment charged, and the government's proof established, that on seventeen different occasions between 1960 and 1964 four separate employers gave either petitioner Murphy or petitioner Mendes or both of them sums of money ranging from $25 to $1000. The four employers, who had been granted immunity from prosecution by the Department of Labor, testified that the payments—in almost all instances made during the Christmas season—were represented as being gifts for petitioners or "[s]omething

for the boys, the needy boys" (App. 11a–12a, 31a, 48a, 60a).[1] The sums were in cash enclosed in envelopes which were personally delivered to petitioners in various offices (and in one instance an automobile) by the employers or their personal messenger (App. 10a, 26a, 32a–33a, 48a, 60a).

Petitioners, in addition to calling character witnesses, took the stand to deny having received money from the government witnesses or any employers.

ARGUMENT

The sole issue here is whether petitioners were so prejudiced by comments of government counsel that there must be a new trial. On the basis of the record, the summation read as a whole and the trial court's instructions, the court below properly affirmed petitioners' conviction; there is no occasion for further review.

1. Government counsel said in part (App. 98a–99a):

> Now, that cross examination of Mr. Kove's was very interesting because it leads to another question. Mr. Kove said, "Well, who else did you give money to?" And he said, "I gave everyone else liquor, but I gave these union officials money, cash."
>
> Well, why were these union officials treated differently from the other people who got liquor? Or, to state the question another way, "Why—why were these so-called Christmas payments made?"

[1] "App." references are to Appellant's Appendix in the court of appeals.

A Christmas payment is usually $5, a bottle of liquor, $10. These really weren't Christmas payments. They took the form of Christmas payments, but they were something else. Here we are talking about roughly $5,000 for a four-year period from four employers. And how many other employers did these union officials represent?

* * * * *

Why did these employers make these payments? That is the important question. Well, you have to understand the industry. And you heard it from all the witnesses. Murphy admitted to it. Nash talked about it. Other witnesses talked about it. When you need men, you call up the union hall and the union hall sends these men to these various construction jobs. Now, it is quite obvious. You have some good workers in that union hall and there are some very bad ones. And if you look at the contracts, you will see that the wage rate for the iron workers belonging to Local 580 are roughly $4 or $5 an hour.

Now, no employer, businessman, who is trying to make money can afford to pay $4 or $5 an hour to an incompetent. He needs a good man. He doesn't want to antagonize these two people because these people can give him a very rough time in their business. These witnesses for the government are businessmen. They want to make money, like you want to make money. You are businessmen also. And that brings up another point.

These two men are still union officials. These employers have no stake whatsoever in antagonizing these two people. These two people

have the power to send these employers poor workers day after day.

Petitioners strain to interpret these remarks as an attempt to inject the crime of extortion into the case. As noted by the court of appeals, the jury was required to choose between the testimony of the employers that they paid money to petitioners and petitioners' testimony that they received no money from any employer. And on this crucial issue of credibility it was relevant and important to show that the employers could well have had a motive to make the payments they said they made. See 1 Wharton's *Criminal Evidence* (12 ed.) § 159, p. 306; cf. *United States* v. *Annunziato*, 293 F. 2d 373 (C.A. 2), certiorari denied, 368 U.S. 919. That petitioners, as union officials, in fact had the power to influence the efficiency of the employers' business operations by sending them good or bad workers is supported by trial testimony (see App. 28a, 30a, 38a, 57a–58a, 68a–69a, 82a–86a).

Government counsel's rhetorical inquiry—"And how many other employers did those union officials represent?"—may, as the court of appeals said, have been unfortunate, but any prejudice occasioned thereby was cured by the immediate remark and instruction of the court that any other payments were not in the case—that the jury could concern itself only with the 17-odd crimes described in the indictment (App. 99a)—and by the subsequent instruction that the jury must rely exclusively on the testimony and exhibits (App. 105a).

2. Nor is there merit to petitioner's argument that the summation unfairly aligned the prestige of the

government against them. Government counsel argued (App. 100a):

> The immunity which was granted to these witnesses was granted by the Department of Labor. Now, the Department of Labor isn't going to grant immunity if no crimes have been committed. And the immunity relates to the testimony that the witnesses give * * *.
>
> * * * * *
>
> And think about this for a minute. Say you haven't committed a crime. What would be the sense of taking immunity if you hadn't committed a crime? If you hadn't committed a crime, you have nothing to worry about. But if you have committed a crime, you need immunity. But once having immunity—well, if you haven't committed a crime, you have nothing to worry about and you are certainly not going to get immunity so that you can walk into court commit perjury, which is a serious crime.
>
> So I think the fact that each of these people received immunity shows that they did this crime, that these defendants received the moneys which the government witnesses admitted to.

In the circumstances, the court of appeals was justified in finding that these remarks of government counsel did not vitiate the convictions. The credibility of the government's employer witnesses had been sharply challenged, and the remarks in question were directed at rehabilitating them. Furthermore, no objection was made to these remarks and no exception taken to the court's instruction (App. 110a) on the significance of the witnesses' receipt of immunity.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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